Supreme Court, U.S.
FILED

941378 FEB 13 1995

No. OFFICE OF THE CLERK

In The
Supreme Court of the United States
October Term, 1994

JOHNSON CONTROLS, INCORPORATED, SYSTEMS & SERVICES DIVISION, and PNEUMATIC CONTROL SYSTEMS COUNCIL,
Petitioners,

v.

UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPE FITTING INDUSTRY OF THE UNITED STATES AND CANADA, AFL-CIO, and ITS LOCAL 353,
Respondents.

On Petition For A Writ of Certiorari To The United States Court of Appeals For the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

DOUGLAS A. DARCH*
THEODORE C. STAMATAKOS
RONALD J. KRAMER
SEYFARTH, SHAW, FAIRWEATHER & GERALDSON
55 East Monroe Street, Suite 4200
Chicago, Illinois 60603-5803
(312) 346-8000
Attorneys for Petitioners
JOHNSON CONTROLS, INC. AND PNEUMATIC CONTROL SYSTEMS COUNCIL

**Counsel of Record*

Chicago Legal Copies, Inc. (312) 332-7777

QUESTIONS PRESENTED

1. Whether, under the principles set forth in the *Steelworkers Trilogy* and *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29 (1987), an arbitrator may, notwithstanding specific contractual limitations on his authority to add to, modify, or alter the parties' agreement, give meaning to a provision in a collective bargaining agreement over which the parties expressly disagreed during negotiations.

2. Whether the federal common law of collective bargaining agreements includes the traditional common law "meeting of the minds" principle that no agreement as to a provision exists where both parties attach materially different meanings to the provision during negotiations, and each party knew the meaning attached by the other.

STATEMENT REQUIRED BY RULE 29.1

Johnson Controls, Inc., has no parent company and, other than wholly owned subsidiaries, has no ownership interest in any other companies. Pneumatic Control Systems Council, which has no parent company or subsidiaries, is an unincorporated association comprised of the following entities: (1) Johnson Controls, Inc., Systems and Services Division; (2) Honeywell, Ltd., Commercial Building Group; and (3) Siebe PLC Environmental Controls Division, Siebe PLC.

PARTIES BELOW

The parties in the proceeding before the United States Court of Appeals for the Seventh Circuit were Johnson Controls, Inc., Systems & Services Division; the Pneumatic Control Systems Council; the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL-CIO; and its Local 353.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

STATEMENT REQUIRED BY RULE 29.1..... ii

PARTIES BELOW ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 2

STATUTORY PROVISIONS 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 10

I. THE SEVENTH CIRCUIT'S FINDING THAT THE ARBITRATOR'S AWARD DREW ITS ESSENCE FROM THE MASTER AGREEMENT CONFLICTS WITH THIS COURT'S DECISIONS IN *MISCO* AND THE *STEELWORKERS TRILOGY* 10

II. THE SEVENTH CIRCUIT'S INTERPRETATION OF THE MEETING OF THE MINDS DOCTRINE AS APPLIED TO COLLECTIVE BARGAINING AGREEMENTS CONFLICTS WITH THAT OF OTHER CIRCUITS 15

Page

CONCLUSION 18

APPENDIX (filed separately)

Decision of the United States Court of Appeals for the Seventh Circuit A-1

Decision and Order of the United States District Court for the Central District of Illinois B-1

Decision of the Arbitrator C-1

Appended Statute D-1

TABLE OF AUTHORITIES

CASES ***Page***

Cement Div., Nat'l Gypsum Co. (Huron) v. United Steelworkers, Local 135, 793 F.2d 759 (6th Cir. 1986) 10

Colfax Envelope Corp. v. Local No. 458-3M, Chicago Graphic Communications Int'l Union, 20 F.3d 750 (7th Cir. 1994) ..... *passim*

Delta Queen Steamboat Co. v. District 2 Marine Eng'rs Ben. Ass'n, 889 F.2d 599 (5th Cir. 1989), *cert. denied*, 498 U.S. 853 (1990) 12, 13

Eastern Air Lines v. Air Line Pilots Ass'n, 861 F.2d 1546 (11th Cir. 1988) 17

Eberhard Foods, Inc. v. Handy, 868 F.2d 890 (6th Cir. 1989) 13

Ethyl Corp. v. United Steelworkers, 768 F.2d 180 (7th Cir. 1985), *cert. denied*, 475 U.S. 1010 (1986) 10, 12

Fairway Center Corp. v. U.I.P. Corp., 502 F.2d 1135 (8th Cir. 1974) 16

George A. Hormel & Co. v. UFCW Local 9, 879 F.2d 347 (8th Cir. 1989) 10

Georgia-Pacific Corp. v. Local 27, United Paperworkers Int'l Union, 864 F.2d 940 (1st Cir. 1988) 15

Page

H.K. Porter Co. v. NLRB,
397 U.S. 99 (1970) 14

Harry Hoffman Printing, Inc. v. Graphic Communications Union, Local 261,
950 F.2d 95 (2d Cir. 1991) 12

In re Marine Pollution Serv., Inc.,
857 F.2d 91 (2d Cir. 1988) 12

International Union Operating Eng'rs, Local No. 670 v. Kerr-McGee Ref. Corp.,
618 F.2d 657 (10th Cir. 1980) 13

Johnson Controls, Inc., Systems & Sews. Div. v. United Ass'n Journeymen and Apprentices of the Plumbing & Pipe Fitting Indus., 145 Lab. Rel. Ref. Man (BNA) 2755 (C.D. Ill. 1994)..... 1

Johnson Controls, Inc., Systems & Servs. Div. v. United Ass'n Journeymen & Apprentices of the Plumbing & Pipe Fitting Indus.,
39 F.3d 821 (7th Cir. 1994) 1

Leed Arch. Prods. v. United Steelworkers, Local 6674,
916 F.2d 63 (2d Cir. 1990) 12

Local Joint Executive Bd. v. Riverboat Casino, Inc.,
817 F.2d 524 (9th Cir. 1987) 17

Local Union 1395, IBEW v. NLRB,
797 F.2d 1027 (D.C. Cir. 1985) 14, 16

Page

Morgan Serv., Inc. v. Local 323, Chicago & Cent. States Joint Bd., 724 F.2d 1217 (6th Cir. 1984) 12

Murphy v. Gatfreund, 583 F. Supp. 957 (S.D.N.Y. 1984) 16

Public Serv. Co. v. Int'l Bhd. Elec. Workers, 902 F.2d 19 (10th Cir. 1990) 17

UFCW, Local 1119 v. United Markets, 784 F.2d 1413 (9th Cir. 1986) 12

United Paperworkers Int'l Union v. Champion Int'l Corp., 908 F.2d 1252 (5th Cir. 1990) 17

United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29 (1987) ..... *passim*

United States v. Haas & Haynie Corp., 577 F.2d 568 (9th Cir. 1978) 16

United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960) 3

United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960) ..... *passim*

United Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574 (1960) 3

Page

STATUTES

28 U.S.C. § 1254(l) 2
28 U.S.C. § 2101(c) 2
29 U.S.C. § 151.....2,3
29 U.S.C. § 185(a) 2,3

MISCELLANEOUS

Burger Iron Co., 78 Lab. Arb. Rep. (BNA) 286 (1981) (Gibson, Arb.)..... 14

Phillips Chem. Corp., 44 Lab. Arb. Rep. (BNA) 102 (1965) (Sartain, Arb.)..... 14

Restatement (Second) Contracts (1979).....16,17

No. _____

In The
Supreme Court of the United States
October Term, 1994

JOHNSON CONTROLS, INCORPORATED, SYSTEMS & SERVICES DIVISION, and PNEUMATIC CONTROL SYSTEMS COUNCIL,

Petitioners,

v.

UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPE FITTING INDUSTRY OF THE UNITED STATES AND CANADA, AFL-CIO, and ITS LOCAL 353,

Respondents.

On Petition For A Writ of Certiorari To The United States Court of Appeals For the Seventh Circuit

OPINIONS BELOW

This petition seeks review of the Decision and Order of a panel of the United States Court of Appeals for the Seventh Circuit, which are reported together as *Johnson Controls, Inc., Systems & Servs. Div. v. United Ass'n Journeymen & Apprentices of the Plumbing & Pipe Fitting Indus.*, 39 F.3d 821 (7th Cir. 1994), and reproduced in the Appendix accompanying this petition at pages A-1 to A-11. The decision of the United States District Court for the Central District of Illinois, reported unofficially as *Johnson Controls, Inc., Systems and Servs. Div. v. United Ass'n Journeymen & Apprentices of the Plumbing & Pipe Fitting*

Indus., 145 Lab. Rel. Ref. Man. (BNA) 2755 (C.D. Ill. 1994), is set forth at pages B-1 to B-12 of the Appendix. The arbitrator's award at issue is set forth at pages C-1 to C-86 of the Appendix.

JURISDICTION

The decision of the United States Court of Appeals for the Seventh Circuit was issued on November 15, 1994. This petition is timely under 28 U.S.C. § 2101(c). Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(l). Jurisdiction of the lower courts was invoked under 29 U.S.C. § 185(a).

STATUTORY PROVISIONS

Section 301(a) of the Labor Management Relations Act of 1947, 29 U.S.C. § 185(a), provides:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Section 151 of the National Labor Relations Act, 29 U.S.C. § 151, is reproduced in the Appendix at pages D-1 to D- 2.

STATEMENT OF THE CASE

This case presents issues of fundamental importance to the development of the federal common law of collective bargaining agreements. These issues have import under both Section 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185, and the National Labor Relations Act ("NLRA"), 29 U.S.C. §§ 151 *et seq*. The courts of appeals need clear guidance from this Court as to how to resolve these issues, for inconsistent rulings could have devastating consequences on the stability of American labor relations and, hence, interstate commerce. 29 U.S.C. § 151.

First, this case raises the question whether, under the principles set forth in the *Steelworkers Trilogy*[1] and *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29 (1987), an arbitrator may, notwithstanding specific contractual limitations on his authority to add to, modify, or alter the parties' agreement, give meaning to a provision in a collective bargaining agreement over which the parties expressly disagreed during negotiations. The United States Court of Appeals for the Seventh Circuit's resolution of this question conflicts with this Court's decisions in *Misco* and the *Steelworkers Trilogy*, and arguably those of other circuits for, quite simply, an arbitrator's decision to give to one party what it failed to achieve through negotiations necessarily does not draw its essence from the parties' collective bargaining agreement.

---

[1] *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574 (1960); *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

Second, this case raises the question whether the federal common law of collective bargaining agreements includes the traditional common law "meeting of the minds" principle that no agreement as to a provision exists where both parties attach materially different meanings to the provision during negotiations, and each party knew the meaning attached by the other. The Seventh Circuit's decision to reject that principle directly conflicts with a decision of the District of Columbia Circuit, and conflicts in principle with at least one other circuit.

Petitioner Systems & Services Division of Johnson Controls, Inc. (the "Company" or "Johnson"), is a member of Petitioner Pneumatic Control Systems Council ("PCSC"), a multi-employer bargaining unit association. Since 1969, PCSC has negotiated national collective bargaining agreements with Respondent United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry (the "UA" or "Union"). The national collective bargaining agreement (the "Master Agreement") at issue mandates arbitration for grievances arising between the parties. The Master Agreement, however, specifically defines the scope of an arbitrator's authority:

> The authority of the . . . impartial arbitrator shall be limited to the construction and enforcement of the express language of this Agreement . . . . The . . . impartial arbitrator shall have no authority or jurisdiction, directly or indirectly, to add to, subtract from, change, modify or supplement any of the specific provisions of this Agreement.

(App. A-3).

In 1989, soon after the parties renegotiated the Master Agreement, UA Local 353 (Peoria) and (Respondent) Local 562 (St. Louis) each filed grievances against Johnson over its assignment of preventive maintenance work to non-bargaining unit employees. (For years, the Company had assigned preventive maintenance work to non-bargaining unit employees.) Both locals claimed that the newly modified Paragraph 13(l) of the Master Agreement required the Company to assign all routine preventive maintenance work exclusively to skilled journeymen and apprentice pipe fitters.[2]

The parties arbitrated the St. Louis grievance before Arbitrator Thomas J. Erbs who, on October 5, 1990, denied the grievance. Arbitrator Erbs found that the parties could not "agree on what had been decided between them" with respect to the work jurisdiction provision. The arbitrator concluded that what the Union sought through the grievance procedure could not be obtained "by implication or arbitral fiat," and "a party cannot secure through arbitration what it was unable to secure through negotiations" (App. B-3). The UA filed suit to vacate the award in the United States District Court for the Eastern District of Missouri, but the court instead enforced the award (App. A-4 n.1).

---

2 Paragraph 13(1) provided:

> This Agreement covers the rates of pay, hours and working conditions of journeymen and apprentices engaged in the installation, service, and maintenance of all plumbing and/or pipe fitting systems, including pneumatic controls and mechanical equipment and component parts . . . .

(App. A-3).

The Peoria grievance (the basis of this action), heard by Arbitrator George Larney, was decided on February 3, 1993.[3] After a detailed analysis of the parties' bargaining history, the arbitrator held that Paragraph 13(l) required that Johnson assign preventive maintenance work exclusively to the UA's members. Critically, however, the arbitrator also found:

> [I]n the case at bar, there was a recognition by the Council and the Union that a resolution of the issue [the assignment of preventive maintenance work] had not necessarily been resolved, that it had been fudged for whatever their respective reasons and that there was almost an understanding that the matter would have to be disposed of in arbitration as evidenced by the remark made by Tarkowski to Moore at the last bargaining session that if the Union felt the new paragraph 8(1) covered the work of PMIs, the Union could file a grievance. Based on this remark and the uncertainty as to the meaning of what had been agreed to, the Arbitrator is of the view that the instant case, like the St. Louis case before Erbs, represents an exception to the "maxim" cited by Erbs.

(App. C-84 to 85) (emphasis added). The "maxim cited by [Arbitrator] Erbs" was that a "party should be barred from securing through arbitration what it was unable to secure through negotiations" (App. C-84 to 85).

---

[3] Petitioners first argued that the Peoria grievance was not arbitrable on *res judicata* and collateral estoppel grounds because of Arbitrator Erbs' award but, in a separate award, Arbitrator Larney found the Peoria grievance arbitrable (App. A-4).

Invoking jurisdiction under Section 301 of the LMRA, 29 U.S.C. § 185, Johnson and PCSC filed this action to vacate the arbitrator's award in the United States District Court for the Central District of Illinois. Johnson and PCSC alleged, among other grounds, that the arbitrator exceeded at issue turned on such a determination; and as he admittedly states, *there was no meeting of the minds* with respect to Paragraph 13(1) despite his express recognition that the parties had disagreed as to the express recognition that the parties had disagreed as to the meaning of Paragraph 13(1) during negotiatons.

The district court, Chief Judge Mihm presiding, vacated the arbitrator's award after finding that the arbitrator had exceeded his contractual authority:

> With all due respect to Arbitrator Larney, his words reveal a violation of the limits of his authority under the Agreement and to his obligation at law to interpret and apply the collective bargaining agreement. *The issue* before Arbitrator Larney *was the intent of the parties*; the interpretation of the paragraph at issue turned on such a determination; and as he admittedly states, *there was no meeting of the minds* with respect to Paragraph 13(1) [the work jurisdiction paragraph]. *Necessarily, Arbitrator Larney's award was based "on some body of thought, or feeling, or policy, or law that is outside the contract."*

(App. B-10) (citation omitted, emphasis added).

UA and Local 353 appealed this decision to the Court of Appeals for the Seventh Circuit, which reversed (App. A-10 to 11). The Seventh Circuit found that the arbitrator's discussion of the parties' bargaining history illustrated that the arbitrator was arguably engaged in interpreting the Master Agreement (App. A-6 to 7). The court dismissed the arbitrator's comments regarding the parties' failure to agree as to the meaning of Paragraph 13(l) as a "possible inconsistency" which did not justify vacating the award (App. A-8).

The court also rejected the district court's finding that the arbitrator's award was beyond the scope of his authority because he had found that the parties came to no meeting of the minds over the work assignment issue:

> We also reject the district court's conclusion that because the arbitrator found the parties came to no "meeting of the minds" concerning the scope of Paragraph 13(1), further arbitration on this issue was beyond his authority. Assuming *arguendo* that the arbitrator actually concluded the parties reached no "meeting of the minds" on the meaning of Paragraph 13(1), such a finding does not prohibit the arbitrator from interpreting the provision. In *Colfax Envelope* [*v. Local No. 458-3M, Chicago Graphic Communications Int'l Union,* 20 F.3d 750 (7th Cir. 1994)], *supra*, we declared the contracting parties' disparate understanding of a particular provision of a collective bargaining agreement do not

render the provision nonarbitrable. 20 F.3d at 754. We stated, "it is common for contracting parties to agree -- that is, to *signify* agreement -- to a term to which each party attaches a different meaning. It is just a gamble on a favorable interpretation by the authorized tribunal should a dispute arise." *Id.* (emphasis in original). We further clarified this principle: "When parties agree to a patently ambiguous term, they submit to have any dispute over it resolved by interpretation. That is what courts and arbitrators are for in contract cases -- to resolve interpretive questions founded on ambiguity." *Id.* (emphasis in original). Only if the contract provision contains a "latent ambiguity," or, in other words, is the result of a mutual misunderstanding, is it subject to rescission and outside the arbitrator's interpretive authority. *Id.* Because Paragraph 13(1) clearly is not the product of a mutual misunderstanding between PCSC and the Union, the district court's "meeting of the minds" analysis was erroneous.

(App. A-9 to 10 (emphasis in original)).

REASONS FOR GRANTING THE WRIT

I. THE SEVENTH CIRCUIT'S FINDING THAT THE ARBITRATOR'S AWARD DREW ITS ESSENCE FROM THE MASTER AGREEMENT CONFLICTS WITH THIS COURT'S DECISIONS IN *MISCO* AND THE *STEELWORKERS TRILOGY*.

While the judicial review of labor arbitration awards is extremely limited, an arbitration award will be upheld only so long as it "draws its essence from the collective bargaining agreement," and does not merely reflect an arbitrator's "own brand of industrial justice." *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 36 (1987) (*quoting United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960)). This Court has declared that, even under a deferential review standard, "courts have no choice but to refuse enforcement of the award" when an arbitrator's words manifest an infidelity to his obligations or where an arbitrator ignores the plain language of the contract. *Enterprise Wheel & Car Corp.*, 363 U.S. at 597; *Misco, Inc.*, 484 U.S. at 38.[4]

---

[4] The lower courts have developed a variety of somewhat conflicting methods to determine when an award does not "draw its essence" from the agreement. *Compare Ethyl Corp. v. United Steelworkers,* 768 F.2d 180, 186 (7th Cir. 1985), *cert. denied,* 475 U.S. 1010 (1986) (award draws essence from agreement even where the arbitrator, despite language prohibiting him from modifying the contract, arguably implies a contractual condition which could not be implied from a literal reading of the contract); *with Cement Div., Nat'l Gypsum Co. (Huron) v. United Steelworkers, Local* 135, 793 F.2d 759, 766 (6th Cir. 1986) (applying four part test for determining whether award draws essence from agreement); *and George A. Hormel & Co. v. UFCW Local 9,* 879 F.2d 347, 350 (8th Cir. 1989) (court will vacate award so contrary to common experience and logic that it is more likely than not that such result was not the parties' intent and where additional facts indicate arbitrator did not premise award on the contract).

The Seventh Circuit's decision upholding the arbitrator's award did not require that that award draw its essence from the Master Agreement. To the contrary, the court held the arbitrator was free to fashion a contract for the parties. As noted above, the arbitrator was asked to determine whether Paragraph 13(l) prohibited the Company from assigning preventive maintenance work to non-bargaining unit employees. The arbitrator, after examining the Master Agreement and the history behind it, found "there was a recognition by the Council and the Union that a resolution of the [assignment of preventive maintenance work] issue had not necessarily been resolved, that it had been fudged for whatever their respective reasons . . .." (App. C-84).

At that point, the arbitrator's task should have been complete: he had *interpreted* the parties' Master Agreement and found that the parties *never* agreed that Paragraph 13(l) prohibited the assignment of preventive maintenance work to non-bargaining unit employees, and he was confined to that interpretation and application of the Master Agreement. The arbitrator, however, admittedly decided to "secur[e] [for the Union] through arbitration what it was *unable* to secure through negotiations." (App. C-84, emphasis added). The arbitrator prohibited the assignment of preventive maintenance work to non-bargaining unit employees in direct contravention of his own interpretation of the Master Agreement. *Enterprise Wheel & Car Co.*, 363 U.S. at 597. Moreover, by imposing a limitation on work assignments where admittedly none had existed, the arbitrator exceeded express contract limitations providing that he would have "no authority or jurisdiction, directly or indirectly, to add to, subtract from, change, modify, or supplement any of the specific provisions of this Agreement." (App. A-2 to 3). *Misco, Inc.*, 484 U.S. at 38 (arbitrator must

act within the scope of his authority).[5] Each of the three reasons the Seventh Circuit gave for upholding the award is inconsistent with the decisions of this Court or with the other decisions of the other circuits.

First, contrary to the Seventh Circuit's reasoning, the length of the arbitrator's award and his discussion of the parties' bargaining history, standing alone, do not demonstrate his award drew its essence from the Master Agreement. To the contrary, the arbitrator candidly concluded that during negotiations the parties *never reached agreement* on whether Paragraph 13(l) would limit the assignment of preventive maintenance work to non-bargaining unit employees. It is a well established principle of federal labor law that an arbitrator may not shield his creation of a new contractual limitation "simply by making the right noises -- noises of contract interpretation." *In re Marine Pollution Serv., Inc.*, 857 F.2d 91, 94 (2d Cir. 1988) (quoting *Ethyl Corp.*, 768 F.2d at 187); *see also Leed Arch. Prods. v. United Steelworkers, Local 6674*, 916 F.2d 63, 65 (2d Cir. 1990).

---

[5] Indeed, the Seventh Circuit's decision appears to diverge from those of many circuits which have vacated awards where an arbitrator adds terms to the parties' agreement. *Harry Hoffman Printing, Inc. v. Graphic Communications Union, Local 261*, 950 F.2d 95, 100 (2d Cir. 1991) (no modification language prohibited arbitrator from imposing contract provision based on elementary due process); *Delta Queen Steamboat Co. v. District 2 Marine Engr's Beneficial Ass'n*, 889 F.2d 599, 604 (5th Cir. 1989), *cert. denied*, 498 U.S. 853 (1990) ("arbitral action contrary to express contractual provisions will not be respected"); *UFCW, Local 1119 v. United Markets*, 784 F.2d 1413, 1416 (9th Cir. 1986) (award in direct conflict with language prohibiting additions to contract vacated); *Morgan Serv., Inc. v. Local 323, Chicago & Cent. States Joint Bd.*, 724 F.2d 1217, 1222-24 (6th Cir. 1984) (clear contract provision cannot be treated as ambiguous and then ignored simply because it varies from the arbitrator's expectations).

Second, the Seventh Circuit's offhand dismissal of the import of the arbitrator's finding of no agreement by characterizing it as a mere ambiguity indicates an avoidance of any judicial review, rather than a deferential review. The arbitrator's clear factual finding that the parties expressly disagreed during negotiations as to the meaning of a contractual provision is not *mere ambiguity*. It is apparent that an award does not draw its essence from the collective bargaining agreement when the arbitrator declares (in a moment of candor) that he will give one party what it had not obtained through collective bargaining. *Cf. International Union Operating Eng'rs, Local No. 670 v. Kerr-McGee Ref. Corp.*, 618 F.2d 657, 660 (10th Cir. 1980) (no mere ambiguity where arbitrator's findings demonstrate grievant was guilty of misconduct which, under contract, mandated his discharge).

Third, the court's finding that by contracting to an ambiguity in Paragraph 13(1), the parties *consented* to have the arbitrator decide whether that ambiguity limited the assignment of preventive maintenance work[6] wholly ignores this Court's decision that an award draw its essence from the parties' agreement. Under any review standard, arbitrators do not have the authority to "interpret" contract language to give it the meaning over which the parties were in open disagreement during negotiations.[7] To the contrary,

[6] "It is common for contracting parties to agree -- that is, to *signify* agreement -- to a term to which each party attaches a different meaning. It is just a gamble on a favorable interpretation by the authorized tribunal should a dispute arise." (App. A-9 *citing Colfax Envelope*, 20 F.3d at 754 (emphasis in original)).

[7] Where the scope of an arbitrator's contractual authority, such as here, is in question, courts differ as to the level of review permitted. *Compare Eberhard Foods, Inc. v. Handy*, 868 F.2d 890, 892 (6th Cir. 1989) (contract language and arbitrator's interpretation thereof determines scope of authority); *with Delta Queen Steamboat Co. v. District 2 Marine Eng'rs Ben. Ass'n*, 889 F.2d 599, 602 (5th Cir. 1989), *cert. denied*, 498 U.S. 853 (1990) (courts free to "scrutinize" award to ensure arbitrator acted within jurisdictional limitations; if arbitrator exceeded contractual authority, award will be vacated).

to give to one party what it did not achieve through negotiations is to ignore this Court's essence of the agreement requirement.

This particular finding, basically an open invitation for "rights" arbitrators to engage in compulsory interest arbitration by claiming the parties consented to such arbitral excess, contravenes a most fundamental principle: the parties are to negotiate agreements, not have them imposed. *H.K. Porter Co. v. NLRB*, 397 U.S. 99, 108 (1970) (NLRB lacks authority to compel employer to accept dues checkoff provision).[8] Far from authorizing interest arbitration, the Master Agreement expressly prohibited the arbitrator from adding to, subtracting from, or modifying express contractual language. Under the principles of *Misco* and the *Steelworkers Trilogy*, the Seventh Circuit erred when it allowed the arbitrator to ignore plain contract language preventing him from modifying the Master Agreement.

If permitted to stand, the Seventh Circuit's decision will signal that parties to a collective bargaining agreement always have an opportunity to gain through arbitration what they could not through contract negotiations -- regardless of contractual limitations on an arbitrator's authority. Parties will have every incentive to have an arbitrator "interpret" into contracts provisions they did not obtain during negotiations. *Cf. Local Union 1395, IBEW v. NLRB*, 797 F.2d 1027 (D.C. Cir. 1985) (discussed below).

---

[8] That a rights arbitrator cannot award to one party what it did not achieve through negotiations is not novel. For thirty years arbitrators have recognized that they have no authority to engage in such contract "interpretation." *See, e.g., Burger Iron Co.*, 78 Lab. Arb. Rep. (BNA) 286 (1981) (Gibson, Arb.); *Phillips Chem. Corp.*, 44 Lab. Arb. Rep. (BNA) 102 (1965) (Sartain, Arb.). Even the arbitrator recognized as much: hence his need to claim an "exception" to the rule.

As the First Circuit aptly recognized, permitting arbitrators to ignore contractual limitations on their authority by substituting their own brand of industrial justice would "promote industrial anarchy by encouraging the exercise of *ad hoc* arbitral revision of collective bargaining agreements." *Georgia-Pacific Corp. v. Local 27, United Paperworkers Int'l Union,* 864 F.2d 940, 946 (1st Cir. 1988). Employers, fearful of becoming subject to interest arbitration, may move to eliminate binding arbitration from their agreements -- further adding to the anarchy.

The arbitrator did not interpret the Master Agreement. The length of the arbitrator's award, the brevity of his clear factual findings, and the Seventh Circuit's desire to have arbitrators engage in interest arbitration cannot negate the fact that, under *Misco, Inc.* and the *Steelworkers Trilogy*, the award did not draw its essence from the parties' collective bargaining agreement and, as the district court properly ruled, should have been vacated.

II. THE SEVENTH CIRCUIT'S INTERPRETATION OF THE MEETING OF THE MINDS DOCTRINE AS APPLIED TO COLLECTIVE BARGAINING AGREEMENTS CONFLICTS WITH THAT OF OTHER CIRCUITS.

The Seventh Circuit found that, assuming the arbitrator concluded that the parties reached no "meeting of the minds" as to the meaning of Paragraph 13(l), he was not prohibited from interpreting the provision because, legally, a failure of the meeting of the minds only occurs where a contract provision contains a latent ambiguity (i.e., where neither party knew the agreement was ambiguous) (App. A-8, *citing Colfax Envelope Corp. v. Local No. 458-3M, Chicago Graphic Communications Int'l Union*, 20 F.3d 750, 754 (7th Cir. 1994)). The court's conclusion directly

conflicts with the established contract law principle that there can be no manifestation of mutual assent "if the parties attach materially different meanings to their manifestations and . . . each party knows or has reason to know the meaning attached by the other." *Restatement (Second) of Contracts*, § 20 (1979). *See also Id.* at § 201(c) ("neither party is bound by the meaning attached by the other, even though the result may be a failure of mutual assent").[9] More importantly, however, the Seventh Circuit's decision as to the federal common law of collective bargaining agreements conflicts with decisions of other circuits.

The Circuit Court for the District of Columbia came to the exact opposite result in *Local Union 1395, IBEW v. NLRB*, 797 F.2d 1027, 1036 (D.C. Cir. 1986). There, the court found that the NLRB, in adjudicating a dispute over a union's right to engage in a sympathy strike, failed to address the administrative law judge's conclusion "that the parties had agreed to disagree over whether sympathy strikes were covered by the [contractual no-strike] clause." *Id.* at 1036. "If accepted," the court found, "this factual finding [was] controlling: absent mutual consent on the issue, there could be no binding contractual commitment." *Id.* (citing *Restatement (Second) of Contracts §§ 20 & 201*). Likewise, the Fifth Circuit has recognized the principle that

---

[9] Courts applying federal and state principles of common law have repeatedly – albeit not uniformly – recognized as much. *See, e.g., United States v. Haas & Haynie Corp.*, 577 F.2d 568, 573 (9th Cir. 1978) (citing *Restatement (Second) of Contracts* for proposition that no contract exists where both parties know the meaning attached by the other); *Fairway Center Corp. v. U.I.P. Corp.*, 502 F.2d 1135, 1142 (8th Cir. 1974) (applying Iowa common law to find no meeting of minds); *but see Murphy v. Gatfreund*, 583 F. Supp. 957, 962 n.6 (S.D.N.Y. 1984) (doctrine inapplicable where both parties were aware of the other's position at the time they entered into an agreement).

there can be no mutual assent where the parties knowingly and expressly disagree as to the meaning of provisions placed in a collective bargaining agreement. *See United Paperworkers Int'l Union v. Champion Int'l Corp.*, 908 F.2d 1252, 1258-59 (5th Cir. 1990) (noting that no meeting of the minds could occur over a contract provision where extrinsic evidence demonstrated that both parties objectively expressed different understandings as to that provision during negotiations).

Besides the conflict between the Seventh and D.C. Circuits and perhaps the Fifth Circuit (which alone is sufficient cause for this Court to resolve the issue), other circuits have gone to great length *not to have to decide* the applicability of the meeting of the minds doctrine under the federal common law of collective bargaining agreements. Two circuits have avoided the issue by resolving cases on other grounds. *See Public Serv. Co. v. Int'l Bhd. Elec. Workers*, 902 F.2d 19 (10th Cir. 1990) (arbitration award upheld on equitable estoppel principles); *Local Joint Executive Bd. v. Riverboat Casino, Inc.*, 817 F.2d 524 (9th Cir. 1987) (award upheld on implied contract theory). Comparatively, the Eleventh Circuit, facing the issue under the Railway Labor Act, carefully distinguished Section 20 of the *Restatement* in order to compel arbitration -- yet then declared that the airline "assumed" the risk of arbitration by entering into a contract and, "if *in fact* resolution of any provision amounts to interest arbitration, this consequence is nothing more than what Eastern could have expected . . .." *Eastern Air Lines v. Air Line Pilots Ass'n*, 861 F.2d 1546, 1551-55 (11th Cir. 1988) (emphasis in original). Given this inconsistency and confusion in the circuits, this Court should resolve the meeting of the minds question once and for all.

This dispute and the general unease among circuits can only destabilize employer/union labor relations. Many

collective bargaining agreements, including the Master Agreement in this case, cover employees working in a variety of federal circuits. Under the Seventh Circuit's misguided interpretation of federal labor law, whether the parties have a binding agreement as to an issue will depend on where the issue is litigated. Indeed, where two arbitrators hearing the same dispute in two different circuits come to the same factual conclusion that there was no meeting of the minds, it is possible one circuit will find no agreement existed while the other will find the same contract valid. That is practically what occurred here: the Eastern District of Missouri upheld one arbitrator's decision that he could not find that the parties had agreed in Paragraph 13(1) to limit the assignment of preventive maintenance work, and the Seventh Circuit has upheld another arbitrator's decision that, despite the lack of agreement, the provision could still be "interpreted."

Employers and unions alike need a resolution of the issue whether, as the Seventh Circuit has now found, only a latent ambiguity will result in a finding of no agreement or, as the common law of contracts currently provides, no agreement also exists where the parties attach materially different meanings to their manifestations and each party knows or has reason to know the meaning attached by the other. Without one common rule, whether contracts exist will be governed by the choice of court rather than the mutual, objective assent of the parties.

CONCLUSION

This case presents issues of national significance, the resolution of which will leave an indelible impact on the American system of labor relations as well as the federal common law. The Court should take this opportunity to reaffirm its teachings in *Misco* and the *Steelworkers Trilogy*

by vacating an award which clearly does not draw its essence from the parties' collective bargaining agreement. The arbitrator here impermissably fashioned his own brand of industrial justice based upon some body of thought or feeling or policy or law outside the contract he was obliged to interpret. Similarly, the time is ripe to resolve the question whether there can be a meeting of the minds sufficient to form a binding contract provision where the parties, in negotiations, have expressly disagreed to the provision's meaning.

For the foregoing reasons stated, this Court should grant Johnson and PCSC's Petition for Certiorari, summarily vacate the Seventh Circuit's Decision and Order, and vacate the arbitrator's award. Alternatively, the Court should grant the Petition and give the case plenary consideration.

Respectfully submitted,

By_____

DOUGLAS A. DARCH*
THEODORE C. STAMATAKOS
RONALD J. KRAMER
SEYFARTH, SHAW, FAIRWEATHER
& GERALDSON
55 East Monroe Street, Suite 4200
Chicago, Illinois 60603-5803
(312) 346-8000

Attorneys for Petitioners
JOHNSON CONTROLS, INC. AND
PNEUMATIC CONTROLS SYSTEM COUNCIL

February 13, 1995
**Counsel of Record*